Supreme Court, U.S.
FILED
MAY 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1509

RELIANCE INSURANCE COMPANY, *Petitioner*

- VS -

F & D ELECTRICAL CONTRACTORS, INC.; J. H. COPELAND & SONS CONSTRUCTION, INC.; and UNITED STATES OF AMERICA, for the Use and Benefit of GRAYBAR ELECTRIC COMPANY, INC., *Respondents*

BRIEF OF RESPONDENT, F & D ELECTRICAL CONTRACTORS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
REASONS FOR DENYING THE WRIT	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASE

United States, etc. v. J. H. Copeland & Sons, et al., 568 F.2d at 1159 (5th Cir. 1978) 3

STATUTES

28 U.S.C. § 1254(1) 1

40 U.S.C. § 270(a) and (b) 2, 5

COURT RULES

Rule 19, Supreme Court of the United States 1

Rule 56, Supreme Court of the United States 8

Rule 35, Federal Rules of Appellate Procedure 7

Rule 12, United States Court of Appeals for the Fifth Circuit 7

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The respondent, F&D Electrical Contractors, Inc., opposes the petition of Reliance Insurance Company pursuant to 28 U.S.C. §1254(1) on the ground that such petition does not properly comport with any applicable provision of Rule 19 of this Court.

OPINIONS BELOW

The statement of the petitioner as to the opinions below and the inclusion of those opinions in the petitioner's appendix is quite proper.

JURISDICTION

F&D agrees that the petition for Writ of Certiorari was timely filed and that this Court could, in its discretion, review the judgment below. It is denied, however, that this is a proper case for such review.

QUESTIONS PRESENTED

The questions presented by the petitioner will not be reiterated except as may be necessary for clarification of respondent's argument.

STATEMENT OF THE CASE

The statement of the case as set forth by the petitioner is essentially correct with the exception of the following minor detail:

Graybar Electric Company, Inc. was a supplier to F&D. Graybar sued the petitioner as well as F&D and the prime contractor in the United States District Court for the Southern District of Florida as Graybar was permitted to do under the Miller Act, 40 U.S.C. § 270(a) and (b). F&D then cross-claimed against the petitioner and the prime contractor. Graybar's claim was settled, and Graybar is not, therefore, an interested party in this proceeding.

RESPONDENT'S REASONS FOR DENYING THE WRIT

I. (As stated by Petitioner)

The Decision of the Court of Appeals Should Have, But Did Not Enforce a Uniform Federal Rule Governing the Rights and Remedies of Subcontractors on Government Construction Contracts to the Same Extent That the Federal Rule Governs the Rights and Remedies of a Prime Contractor With Respect to Changes in the Amount of Work and Delays in the Time of Completion. The Court Below Erroneously Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

(Petitioner's Brief, pg. 6)

There is no dispute as to the broad general statement of the petitioner with respect to the rights of a prime contractor vis a vis those of the government relative to government construction contracts. What is subject to dispute is the statement of the petitioner that the decision of the United States Court of Appeals for the Fifth Circuit has held that government imposed change orders may serve to excuse further performance of subcontractors and justify their abandonment of a federal project.

This statement is clearly misleading. The decision as criticized by petitioner, *United States for use and benefit of Graybar Electric Company, Inc.* v. *J. H. Copeland & Sons Construction, Inc. et al.*, 568 F.2d 1159 (5th Circuit 1978), as germane to petitioners' dispute with F&D, relates to delays caused by the prime contractor as to its subcontractor under a private contract. Petitioner's argument is thus based upon an evidentiary disagreement which has no relevancy before this Court. Petitioner has consistently argued in all courts below that the delays involved were created by the government whereas the decisions under attack by

the petitioner relate those delays primarily to the government contractor.

For the foregoing reasons, there was no need for the United States Court of Appeals to adopt a uniform rule as urged by the petitioner since the clear import of the evidence as shown on the face of such decisions could not possibly justify the adoption of such rule.

II. (As stated by Petitioner)

The Decision of the Court of Appeals, Which Held That a Subcontractor on a Government Project Which Underwent Significant Government-Imposed Changes and Time Extensions Could Establish a Material Breach of the Subcontract Which Excused Further Performance Based on the Mere Existence of Delays in Completion Without Establishing How Those Delays Prejudiced His Performance, Conflicts With Decisions of the United States Court of Claims and Other Courts of Appeal, and Decides an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

(Petitioner's Brief, pg. 8)

An acute response to petitioner's Point II is contained in the following statement of the United States Court of Appeals for the Fifth Circuit:

> "Appellant also contends that F&D was required to prove the specific extent of the alleged wrongful delay caused by Copeland itself, distinguished from delays occasioned by the government. However, the cases relied upon, *Bruno Law, supra; Boyajian* v. *U.S.*, 1970, 191 Ct. Cl. 233, 423 F.2d 1231; *Wunderlich Contracting Co.* v. *U.S.*, 1965, 173 Ct. Cl. 180, 351 F.2d 956; *Commerce International Co.* v. *U.S.*, 1964, 167 Ct. Cl. 529, 338 F.2d 81; and *Great Lakes Construction Co.* v. *U.S.*, Ct. Cl. 1942, 95 Ct. Cl. 479, all involved claims by contractors against the United States for damages sustained as a result of delay caused by the government. They concerned the proof necessary to

> establish not merely the fact of breach of contract but the amount of damages assessable against the United States as a result. The exacting rules conditioning the determination of damages against the sovereign for its delay do not prescribe what constitutes a breach of contract by a private party for purposes of excusing further performance.
>
> Hence, we are unable to find the trial court erred in concluding that Copeland breached its subcontract with F & D, and that this excused F & D's failure to continue work after August 8, 1974."

(Petitioner's Appendix B, pg. 13a)

There was no holding in the United States Court of Appeals that F&D was to be awarded damages against the petitioner-surety under the Miller Act, 40 U.S.C. § 270(a) and (b) on the basis that delay damages were recoverable under the Miller Act.

The United States Court of Appeals did hold as follows:

> "Here, there were only two causes of the delay; the government change-orders and Copeland's lack of diligence. Copeland is liable under the subcontract for all additional costs sustained as a result of government change-orders.[1] Copeland is liable in breach of contract for all damage suffered as a result of its own lack of diligence. Hence, re-

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[1] Provision three of the general contract, as incorporated by reference in the subcontract, provides in relevant part:

> The Contracting Officer may, at any time . . . make any change in the work within the general scope of the contract . . .
>
> • • • • • •
>
> If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work . . . an equitable adjustment shall be made and the contract modified accordingly . . .

gardless of the amount of damage attributed to each cause, Copeland is liable for the whole. The damages were properly assessed to cover both. Accordingly, the judgment of the district court is AFFIRMED."

(Petitioner's Appendix B, pg. 14a)

Petitioner really seems to continue to argue an evidentiary situation which was settled below. The respondent, F&D, is therefore constrained to repeat that such an argument has no propriety before this Court.

III. (As stated by Petitioner)

The Decision of the Court of Appeals, Which Held That the Portion of the "Disputes" Clause, Which Requires the Contractor to "Proceed Diligently With the Performance of the Contract" in the Event of a Dispute Over a Delay in the Time of Completion Was Not Incorporated by Reference Into the Subcontract, Conflicts With a Decision of Another Court of Appeals and Presents an Important Federal Question Which Has Not Been, But Should Be, Decided by This Court.

(Petitioner's Brief, p. 13.)

On page 14 of its brief, the petitioner states the following:

"Although the subcontract between Copeland and F & D specifically incorporates by reference, and binds the subcontractor to, the 'Contract Documents between the Owner and Contractor,' the Court of Appeals ruled as a matter of law that this portion of the Disputes Clause of the General Provisions was not incorporated by reference."

Of course the Court of Appeals held that the Disputes Clause was not incorporated into the private contract between the prime and subcontractor, F&D. The Court of Appeals held that the Disputes Clause was not relevant here. In this regard, the Court of Appeals stated:

The trial court found that the subcontract between Copeland and F&D incorporated by reference the terms of the general contract between Copeland and the government.[2]

CONCLUSION

The petitioner failed to apply to the United States Court of Appeals for the Fifth Circuit for Rehearing En Banc pursuant to Rule 12 of the United States Court of Appeals for the Fifth Circuit and Rule 35 of the Federal Rules of Appellate Procedure.

The petitioner shows no ground for granting a Writ of Certiorari, and this respondent, accordingly, urges denial.

Because of the delay to the respondent, F&D, occasioned by the petition, and in view of the attendant circumstances, such respondent respectfully suggests that this is an appropriate case for an award of such interest and damages in the respondent's favor as the Court may adjudge pursuant to Rule 56 of this Court.

Respectfully submitted,

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[2] Only the "disputes" clause, which is not relevant here, was not incorporated. See, *H. W. Caldwell & Son, Inc.* v. *U.S. for the use of John H. Moon & Sons, Inc.*, 5 Cir. 1969, 407 F.2d 21."

Petitioner's Appendix B, pg. 11a.